TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Consumer Law Note

Don't Forget Basic Contract Theories!

A recent case decided by the Appellate Court of Connecticut reminds us that statutory protections are not the only remedies available to consumers. Many times, contract law theories provide winning approaches to consumer problems. In *Family Financial Services, Inc. v. Spencer,*[1] the theory of unconscionability provided just such an effective remedy.

Spencer involved the owner of a home who needed a loan to repair a roof.[2] The court described the facts behind the second mortgage to finance these repairs as follows:

> The amount of the loan was $30,000 with an interest rate of 20 percent. The note required eleven monthly payments of $500 with a final balloon payment of $30,500 on July 20, 1991. In the defendant's loan application, she stated that her monthly income was $1126.67 and that she owed a monthly amount of $1011 to Peoples Bank on a first mortgage. The plaintiff placed the defendant in a class C category that did not require income verification.[3]

As one might expect, the homeowner was not able to meet the balloon payment when it came due. Consequently, she arranged to take out another loan to pay off the first. The terms of this loan were as follows:

The amount of the note in this transaction was $44,000 with an interest rate of 20 percent. The defendant was required to make eleven monthly payments of $733.33 with a final balloon payment of $44,733.33 on 22 July 1992.[4]

Again, the homeowner could not make the balloon payment and the finance company brought a foreclosure action. The homeowner filed special defenses to this action. Among them was the assertion that this second mortgage was both procedurally and substantively unconscionable.[5] The trial court found for the homeowner and the finance company appealed.[6]

Unconscionability at common law applies to a contract that is "such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on another."[7] In recent times, the use of unconscionability as a consumer protection tool has become more widespread.[8] To simplify consideration of the topic, courts often distinguish between procedural and substantive unconscionability. Procedural unconscionability "has to do with lack of fairness in the formation of the contract."[9] Substantive unconscionability, on the other hand, "refers to the content or substance of the contract and includes such matters as price, credit terms, forfeiture provisions, and so on."[10]

In *Spencer*, the trial court had found the following facts regarding the transaction:

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1. 677 A.2d 479 (Conn. App. Ct. 1996).

2. *Id.* at 481.

3. *Id.*

4. *Id.* It is also interesting to note that, in addition to the onerous terms of the loans, the homeowner was required to pay one year's interest in advance. *Id.*

5. *Id.* at 482. The other defenses were that "the mortgage was a scheme to defraud . . . lacked consideration because the plaintiff failed to release the July 16, 1990 mortgage, and violated [provisions of the Connecticut] General Statutes." *Id.*

6. *Id.*

7. HOWARD J. ALPERIN & ROLAND F. CHASE, CONSUMER LAW 245 (1986).

8. *See generally id.* at §§ 171-80.

9. *Id.* at 272. Courts look at all aspects of the transaction, but their considerations can be lumped generally into the categories of inequality of bargaining power, merchant's conduct, and the consumer's weaknesses. *See id.* at §§ 187-93.

> (1) the defendant had a limited knowledge of the English language, was uneducated and did not read very well; (2) the defendant's financial situation made it apparent that she could not reasonably expect to repay the second mortgage; (3) at the closing, the defendant was not represented by an attorney and was rushed by the plaintiff's attorney to sign the documents; (4) the defendant was not informed until the last moment that, as a condition of credit, she was required to pay one year's interest in advance; and (5) there was an absence of meaningful choice on the part of the defendant.[11]

Based upon these facts and the concealment of the actual creditor by the finance company, the appellate court agreed with the trial court that the loan was procedurally unconscionable. The court also found the loan to be "unreasonably favorable to the [finance company]."[12] Based on this, the appellate court also upheld the trial court's finding of substantive unconscionability.[13] As a result, the court upheld the trial court's injunction against the foreclosure action.[14]

Spencer shows the efficacy of unconscionability in helping to "prevent oppression and unfair surprise."[15] While statutory protections should never be ignored when they are available, the common law and UCC doctrine of unconscionability offers a valuable alternative basis for consumer relief. Of course, legal assistance practitioners will not be litigating these cases absent an extended legal assistance program (ELAP). Even so, all practitioners must keep basic contract law doctrines in mind so they can properly advise clients on the merits of their case, the relief available to them, and whether they should seek civilian counsel to pursue the matter. Major Lescault.

Family Law Note

Many Retirees Still Liable for Payment of Up to Half Their Retirement Pay Despite Uniform Services Former Spouse's Protection Act and Mansell Holding

Legal assistance attorneys drafting separation agreements in divorce cases need to closely consider the language on division of military retirement pay to protect their client's interest and ensure the intent of the parties is clear. The Uniform Services Former Spouse's Protection Act (FSPA) allows states to treat disposable military retirement pay as property in a divorce action.[16] The FSPA definition of disposable retired pay specifically excludes pay received from the Veteran's Administration as a result of a disability determination.[17] In order to prevent double dipping, the service member must waive a portion of the retirement pay to collect the disability pay. The United States Supreme Court addressed this issue in *Mansell v. Mansell*,[18] holding that states were preempted from dividing the disability pay under the FSPA. Thus, a service member who elects to accept the disability pay in lieu of retirement pay often drastically reduces the amount of disposable retired pay available for division under the FSPA.

Despite *Mansell* and the language of the FSPA itself, many courts require the service member to pay an amount equivalent to what the former spouse would have received if the service member did not elect disability payments.[19] Usually, this results because of equitable or contract principles. Generally, this situation happens due to the drafting of the separation agreement which later is incorporated by the divorce decree.

The following cases illustrate common separation agreement clauses that resulted in the court awarding additional payments to the former spouse. *Dexter v. Dexter*[20] involved a separation agreement ultimately incorporated into the divorce decree simply awarding "47.5% of the military pension on a monthly basis, as, if and when it is paid by the Department of

10. *Id.* at 272.

11. *Spencer*, 677 A.2d at 486.

12. *Id.* at 485.

13. *Id.*

14. *See id.* at 482. The court overturned an award of attorney's fees that the trial court had awarded based on a statutory violation. *See id.* at 489.

15. *Id.* at 485.

16. 10 U.S.C.A. § 1408 (West 1996).

17. *Id.* § 1408(a)(4)(B).

18. 490 U.S. 581 (1989).

19. McHugh v. McHugh, 861 P.2d 113 (Ct. App. Idaho 1993), Kraft v. Kraft, 832 P.2d 871 (Wash. 1992), Clauson v. Clauson, 831 P.2d 1257 (Alaska 1992), Owen v. Owen, 419 S.E.2d 267 (Ct. App. Va. 1992).

20. 661 A.2d 171 (Ct. App. Md. 1995).

the Army to [the appellant]"[21]. The service member retired after the divorce and eventually waived a portion of retirement to accept disability pay. The former spouse filed suit for a money judgment in the amount of the lost retirement pay. Both the trial and the appellate court relied on basic contract theory to hold that the service member owed the former spouse the full amount contemplated by the original bargain in the separation agreement. Specifically, the court said, "We hold the voluntary waiver of appellant's Army retirement pension was a breach of contract, for which the measure of past damages is the amount the receiving spouse would have received had appellant not committed the breach."[22] The court also found that *Mansell* did not apply to this case since the trial court did not order the appellant to pay the appellee a percentage of his disability pay.[23]

In *Hisgen v. Hisgen*,[24] the separation agreement stipulated that the service member would instruct Air Force Accounting and Finance to pay the spouse one-half of his gross annuity payments per month beginning 1 August 1993. During the negotiations of the separation agreement both parties knew the service member was applying for military disability benefits. After waiving a portion of retirement for disability, the disposable retired pay portion for the spouse was $50.00, a decrease of $300.00 per month. The spouse sought enforcement of the agreement as a breach of contract. The South Dakota Supreme Court agreed that the intention of the parties was for the spouse to receive *a specific monthly sum* regardless of the source.[25] Again, the court found *Mansell* was not dispositive. The holding in *Mansell* prevents divorce courts from awarding a spouse veteran's disability payments when military retirement pay has been waived to receive such benefits. However, that does not preclude state courts from interpreting divorce settlements to allow a spouse to receive property or money equivalent to half a veteran's retirement entitlement.[26]

Practitioners need to be aware of the potential consequences of separation agreement language. Simply dividing the military pension is not sufficient to address the potential consequences down the road when retirement actually occurs. Remember the basic principles of contracts and carefully define terms and the intentions of the parties. Major Fenton.

21. *Id.*

22. *Id.* at 172.

23. *Id.* at 174.

24. 554 N.W.2d 494 (S.D. 1996).

25. *Id.* at 497.

26. *Id.* at 498.

Tax Law Note

Rental Property Depreciation

Taxpayers who rent out real property are entitled to deduct depreciation.[27] Since a taxpayer's basis in his rental property is reduced by the greater of the amount of depreciation that the taxpayer took or the amount of depreciation that he should have taken, taxpayers should always deduct depreciation on rental property.[28] Unfortunately, legal assistance attorneys will occasionally encounter a client who for some reason failed to take depreciation on their tax return. Prior to 1996 the only solution for these clients was to take depreciation in the current year and file amended returns for returns filed within the statute of limitations, which is three years. If the taxpayer rented the real property for more than three years, they lost the depreciation that they should have taken during the period outside the statute of limitations. Now taxpayers have a new option, which is outlined in Revenue Procedure 96-31.

A taxpayer who has failed to take depreciation on rental property for more than three years can now recapture the entire amount of depreciation that the taxpayer should have taken.[29] The taxpayer needs to file two copies of IRS Form 3115 no later than 180 days after the start of the current tax year, which is 29 June 1997 for this tax year, to the Commissioner of Internal Revenue, ATTN: CC:DOM:P & SI:6, Room 5112, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. When the taxpayer files his tax return for 1997, the taxpayer will be able to claim all of the depreciation to which he was entitled during the entire rental period. Following this procedure is substantially more beneficial to the taxpayer who has rented property and not previously taken depreciation for a period that exceeds the three year statute of limitations. Major Henderson.

Soldiers' and Sailors' Civil Relief Act Note

Pre-Service Lease Terminations May Be Subject to Landlord "Equitable Offsets"

27. I.R.C. § 167 (RIA 1996).

28. I.R.C. § 1016(a)(2) (RIA 1996).

29. Rev. Proc. 96-31, 1996-20 I.R.B. 11.

According to a 1995 ruling by the United States District Court of Nevada, service members who terminate a pre-service lease pursuant to section 534(2), Title 50 Appendix, United States Code [The Soldiers' and Sailors' Civil Relief Act (SSCRA)],[30] may be subject to landlord counterclaims for an "equitable offset" that can amount to more than the military member's remaining monthly rental obligations and security deposit under the lease agreement.[31]

On 25 September 1985, Omega Industries, Inc. (Omega), a commercial real estate development company, leased Las Vegas, Nevada medical office space to Dr. Thomas Raffaele (Dr. Raffaele), a licensed optometrist. Doctor Raffaele leased the premises without incident and on 21 August 1991, signed a new five year lease with Omega for a larger office in the same office complex, commencing on 1 November 1991. Omega agreed in exchange for the long lease period to make a number of improvements to Dr. Raffaele's office space and to reduce its per square foot rental rate. Dr. Raffaele also agreed to sign a personal guaranty which covered all rent, attorney fees, and costs in enforcing the lease. On 30 October 1992, Dr. Raffaele submitted an application to join the United States Public Health Service (USPHS) to the United States Department of Health and Human Services (HHS), and HHS accepted his application in February 1993, commissioning him in the rank of Lieutenant Commander, and giving him a report date of 5 April 1993 for his initial duty assignment at the USPHS Indian reservation medical clinic at Lame Deer, Montana.[32]

During the month of March 1993, Dr. Raffaele notified Omega of his USPHS appointment and of his desire to terminate his office lease at the end of March 1993. Also, on 16 March 1993, HHS notified Omega that Dr. Raffaele was entitled to terminate his medical office lease without penalty or loss of security deposit pursuant to the SSCRA. On 25 April 1993, Dr. Raffaele notified Omega in writing that he had vacated his leased office space and terminated his rental agreement. Omega immediately attempted to re-lease Dr. Raffaele's office space but did not obtain a new tenant until ten months later for a lesser per square foot rental rate.[33]

Omega filed suit against Dr. Raffaele for breach of his 1991 lease agreement, seeking damages for lost rental income, reduced rental value of the office space, uncompensated tenant improvements added to the office space at tenant's request, realty commissions, and attorney fees and court costs. While acknowledging the lease termination provision of the SSCRA, Omega argued that under section 534(2), the court may modify or restrict the right of a tenant to seek lease termination under the SSCRA if the landlord can demonstrate "undue hardship" or countervailing equity considerations. Omega argued that Doctor Rafaele demonstrated "bad faith" by signing a long-term lease and then going on voluntary military duty, which justified their recovery for breach of the lease.[34]

Doctor Rafaele argued that (1) the SSCRA lease termination provision provides the courts with no authority to hold him liable for tenant improvements, realty commissions, and attorney fees and costs; (2) Omega failed to credit him for improvements he added to the office premises at his own expense; (3) Omega failed to mitigate damages by recovering cabinets he added to the leased premises prior to reletting the premises; (4) Omega had "unclean hands" by failing to credit him with his security deposit; and (5) Omega recouped its losses through tax loss deductions and other business venture offsets.[35]

The court found that Dr. Rafaele was covered by the SSCRA as a USPHS officer on active duty[36] and was entitled to invoke section 534(2) of the Act. The court, noting this was a case of first impression, proceeded to interpret section 534(2), and held that the plain language of the section and its legislative history give courts broad discretion in fashioning an equitable remedy for an aggrieved landlord, which may not be limited by the total amount of a military member's rental obligation and security deposit under the lease.[37]

The court first reviewed the statutory language of section 534(2), which allows service members to terminate pre-service leases and receive a refund of any unpaid rent or security deposit.[38] The court concentrated on the statutory language which provides that SSCRA relief "shall be subject to such modifications or restrictions as in the opinion of the court jus-

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30. Soldiers' and Sailors' Civil Relief Act of 1940, ch. 888, §§ 100-605, 54 Stat. 1178 (1940) [hereinafter SSCRA], *codified at* 50 App. U.S.C. §§ 501-593, as amended. Henceforth, the citations to the SSCRA will be to the statute sections of Title 50 Appendix, rather than the original Act.

31. Omega Industries, Inc., v. Dr. Thomas Raffaele, 894 F. Supp. 1425 (D. Nev. 1995).

32. *Id.* at 1427-28.

33. *Id.* at 1428.

34. *Id.*

35. *Id.* at 1428-29.

36. *Id.* at 1429-30, and 42 U.S.C. § 213(e) (1994).

37. *Omega*, 894 F. Supp. at 1430.

38. *Id.*

tice and equity may in the circumstances require."[39] The court then suggested that "equity and justice" may require that a service member compensate a landlord for damages caused by early lease termination in excess of the military member's rental obligations and security deposit, to fully compensate the landlord for losses incurred.[40] The court used the example that a remedy beyond the military member's remaining rent and security deposit obligations would be appropriate where the landlord brought forth evidence that the military member intentionally asked the landlord to make improvements in a commercial property, knowing that he intended to break the pre-service lease and join the military.[41] The court pointed out that the statutory language did not limit the court's authority to fashion such an equitable remedy.[42]

The court looked at the legislative history of the SSCRA, and determined that Congress intended to grant courts broad discretion in determining remedies under the Act.[43] The court found nothing in the legislative history preventing a court from awarding a landlord damages resulting from SSCRA pre-service lease termination greater than the military member tenant's total remaining rent and security deposit obligation.[44]

The court reviewed the equitable doctrine of unclean hands[45] as applied to the parties in this case. The court determined that the failure of Omega to credit Dr. Rafaele for his monetary contributions to tenant improvements to the leasehold, including cabinets, which Omega removed from the office upon Dr. Rafaele's lease termination, and discarded without any attempt made to resell them or seek at least salvage value was not bad faith. The court further determined that Omega's retaining Dr. Rafaele's security deposit in violation of section 534(2) was not bad faith. The court based its decision on contractual, procedural, equitable, and factual grounds.[46]

The court noted that Dr. Rafaele's lease included a provision that all tenant improvements became the sole property of the

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39. *Id.*, *quoting* 50 App. U.S.C. § 534(2) (1994).

40. *Id.* at 1430.

41. *Id.* The court's example evokes a situation that would be extremely rare and has not been documented in reported cases.

42. *Id.*

43. *Id.* at 1430-31, 1430 n.4. The court looked only at the general intent of Congress in passing the original Soldiers' and Sailors' Act of 1918 (40 Stat. 440) and not at the legislative history of either the 1940 reenactment of the Soldiers' and Sailors' Civil Relief Act [Soldiers' and Sailors' Civil Relief Act of 1940, ch. 888, 54 Stat. 1178 (1940) (codified as amended at 50 App. U.S.C. §§ 501-591 (1994)] nor the actual legislative history of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942, wherein section 304(2), (codified at 50 App. U.S.C. § 534(2)) was enacted [Soldiers' and Sailors' Civil Relief Act Amendments of 1942, ch. 581, § 12, 56 Stat. 772 (1942) (codified as amended at 50 App. § 534(2) (1994))].

44. *Omega,* 894 F. Supp. at 1430-31, 1430 n.4. The actual legislative history of section 534(2) is reflected in U.S. House of Representatives Congressional Hearings on H.R. 7029, which was the basis for section 304(2) of the SSCRA Amendments of 1942, 77th Congress, 2d Session, 22 May 1942. The drafter of section 304(2), on behalf of the War Department, Major William Partlow, was questioned by the United States House of Representatives Committee on Military Affairs about section 304(2):

> Major PARTLOW. Of course, the theory behind this section is that the person in military service is no longer able to enjoy the use of the property rented under the lease. In other words, he would be paying for something he is not getting, no matter how much money he might have or how many means he may have to discharge his obligations under the lease. Nevertheless, if on account of his military service, he is not able to enjoy the use of the property, it seems to me equitable that he should not have to pay for it.
>
> Mr. ELSTON. This includes business property as well as other property?
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> Major PARTLOW. Yes, Sir.
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> Mr. KILDAY. It would protect, for instance, the lawyer who had an office from which he practiced his profession, who was drafted into the Army as a Private, as many of them are being. If we put him in the position of taking him into the Army, and giving him military compensation, and then also keeping him tied to the terms of his lease, with no opportunity to enjoy it, we would put him in a position where, when he came out of service, he would have a large financial obligation, and subject to a judgment. That would put that soldier in exactly the mental attitude that we are attempting to take him out of by every provision of this act.
>
> Major PARTLOW. Yes, Sir.
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> Mr. ADDISON. [I]f I own a piece of property and a man has to go into the Army, and I had a lease with him, certainly I ought to go without any rent until I can find another tenant, or even if he is a professional man, a dentist, say, he ought to have a fair chance of salvaging that lease in renting to someone else, but if that particular dentist had required that I spend $5000, maybe, 2 years whole rent, to bring the facilities that he especially wanted, usable for himself only--if after I had spent that for his use, then I would have to get it back if I couldn't get another lessee that would take it.

Hearings Before the Committee on Military Affairs on H.R. 7029, A Bill to Amend the Soldiers' and Sailors' Civil Relief Act of 1940, 77th Cong., 2nd Sess., at 24-26, 64 (1942).

45. *Omega,* 894 F. Supp. at 1431, *citing* Ellenburg v. Brockway, Inc., 763 F.2d. 1091, 1097 (9th Cir. 1985). The "unclean hands doctrine" says that he who would invoke the equitable powers of the court, must come with clean hands or be barred from equitable relief.

46. *Id.* at 1431-32.

landlord, which meant that Omega had no obligation to salvage or resell its own property. The court opined that Dr. Rafaele failed to file a counterclaim for reimbursement for tenant improvements and improper security deposit withholding, which the court found to be no fault of Omega's. The court found that Omega "may have been negligent" by its failure to recover the salvage value of fixtures installed by the tenant, its wrongful withholding of Dr. Rafaele's security deposit, and its failure to seek mitigated damages, but such negligence did not translate into sufficient bad faith to invoke the unclean hands doctrine.[47] Finally, the court found that Dr. Rafaele failed to produce sufficient evidence to determine if Omega had in fact recouped any losses by tax write-offs on the vacant office space.[48]

The court, having disposed of Dr. Rafaele's equitable defenses, reviewed whether Omega was entitled to recovery of its lost rent and expenses on equitable grounds. Omega argued that Dr. Rafaele should be equitably estopped from utilizing section 534(2) of the SSCRA because he intentionally deceived Omega as to his true intent to join the military when he signed his lease. The court found that Dr. Rafaele did not act in bad faith in signing his five year office lease, as he had not considered USPHS service until after he had signed the lease and was unaware of section 534(2) of the SSCRA when he signed the lease. Furthermore, the court took notice that Dr. Rafaele had to apply to USPHS during the lease period or he would have been too old to apply for USPHS service after July 1993. The court also took notice that Dr. Rafaele obtained no financial advantage from his USPHS service which resulted in a drop in his actual income, his standard of living, and living conditions. The court concluded that Dr. Rafaele was motivated by a desire for public service and love of country, not personal financial gain in joining the USPHS.[49]

Omega argued that Dr. Rafaele should not be allowed to take advantage of section 534(2) of the SSCRA since he was not involuntarily activated for military duty during "a time of crisis such as the Persian Gulf War."[50] The court responded by recognizing that the SSCRA applies in time of peace as well as war, but added, "it is not to be applied for any unwarranted purpose."[51] The court conceded that the SSCRA is to be liberally construed and applied with "a broad spirit of gratitude towards service personnel."[52] The court then determined that since public policy interests were involved, that the court in making its equity decision will go "farther both to grant and withhold relief in furtherance of the public interest."[53] The court devised a test that it would withhold the protection of section 534(2), SSCRA, only if there is "clear and strong evidence indicating that he is utilizing the Act for "purely unwarranted purposes"[54] Upon review of the facts of Dr. Rafaele's case, the court determined that his voluntary entry into USPHS service and termination of his office lease was not outside the proper scope of the Act.[55]

This first impression case raises serious questions as to whether courts may allow landlords to eviscerate the intent of the Act by asserting claims for lost rent and consequential damages resulting from pre-service lease terminations allowed by section 534(2), SSCRA, for amounts greater than the military member's remaining rental obligation and security deposit. Judge Advocate officers advising individuals wishing to assert section 534(2), SSCRA, to terminate a pre-service commercial or professional office lease where the landlord has expended significant amounts in modifying the premises at the tenant's request, should advise their clients of the strong possibility of landlords asserting an "equitable offset" lawsuit to recoup their costs. In the case of most residential tenants who terminate pre-service leases under section 534(2), the strong equities of their situations should dissuade any landlord attempts to assert "equitable offsets." Major Conrad.

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47. *Id.* The court relied upon dicta in *Dollar Systems, Inc. v. Avcar Leasing Systems, Inc*., 890 F.2d 165, 171 (9th Cir. 1989) that a party's gross negligence does not rise to the level of bad faith necessary to invoke the clean hands doctrine. The court misconstrued the *Dollar Systems* dicta, which only states that simple breach of contract did not constitute bad faith sufficient to invoke the clean hands doctrine. In this case, the plaintiff landlord did not merely breach a term of a lease, but disobeyed a federal law [Section 304(2), SSCRA] not to withhold prepaid rent or security deposit where a pre-service lease was properly terminated. *See also* Patrikes v. J.C.H. Service Stations, Inc., 41 N.Y.S.2d 158 (N.Y. City Ct. 1943).

48. *Omega*, 894 F. Supp. at 1432.

49. *Id.* at 1433-35.

50. *Id.* at 1434.

51. *Id., quoting with approval*, Patrikes v. J.C.H. Service Stations, Inc., 41 N.Y.S.2d 158, 165 (N.Y. City Ct. 1943).

52. *Id.*

53. *Id., citing* Virginian Railway Co. v. System Federation, 300 U.S. 515, 552 (1937).

54. *Id.* There is no statutory or equitable basis for a "clear and convincing" or "strong evidence" test in determining whether service members may avail themselves of section 534(2) to terminate pre-service leases. The court has no discretion under equity or the statute to make such a determination. The court only has discretion to modify or restrict those applications of the pre-service lease termination provision that work undue hardship on the lessor on a case by case basis. The *Patrikes* case provides no basis for creating such a judicial test of service member "worthiness" to obtain the ability to terminate pre-service leases.

55. *Id.* at 1435.

AR 15-6 Developments

New developments in commander-directed investigations under Army Regulation 15-6[56] should enhance the quality and credibility of these investigations, particularly the informal ones. First, and most importantly, the regulation has recently been changed. Several of the new provisions are intended to ease the burden on civilian-heavy organizations, while others are intended to tighten requirements to improve the reliability of the final product.

Investigations can now be appointed by a Department of the Army GS-14 supervisor assigned as the head of an Army agency or activity or as a division or department chief.[57] Army Material Command units should also find relief in the authorization for Army GS-13s to be assigned as investigating officers or voting members of boards.[58] One appointment limitation has been added: only the general court-martial convening authority can appoint an investigation or board into incidents involving property damage of $1 million or more, the loss or destruction of an Army aircraft or missile, or an injury or illness resulting in or likely to result in death or permanent total disability.[59] In serious cases, such as death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action or will be relied upon by higher headquarters, a legal review is now required.[60]

Requirements have also added to the selection process for investigating officers and board members: as with court-martial members, they will be those who are "best qualified" for the duty.[61] Further, before beginning an informal investigation, the investigating officer must consult with the servicing judge advocate for legal guidance.[62]

To assist judge advocates in providing guidance for investigating officers, the Administrative Law Division of the Office of The Judge Advocate General has developed an investigation guide,[63] which has been distributed through the Staff Judge Advocate Forum. The guide is designed to be tailored for local use, so it can be revised to include local points of contact and to address local regulations and local conditions; for example, cadre-student prohibitions at training installations. As part of the briefing with the investigating officer, the judge advocate can use the guide as a talking paper and can provide a copy to the investigating officer for use during the investigation. The guide incorporates the recent regulatory changes and will be periodically updated to keep it current and useful. Recommended improvements should be sent to Chief, General Law Branch, Office of The Judge Advocate General. Lieutenant Colonel Sullivan.

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56. Dep't of Army, Reg. 15-6, Procedure for Investigating Officers and Boards of Officers (11 May 1988) (C.1, 30 Oct. 96).

57. *Id.* para. 2-1a(1)(e).

58. *Id.* para. 2-1c(1).

59. *Id.* para. 2-1a(3).

60. *Id,* para. 2-3b.

61. *Id.* para. 2-1c.

62. *Id.* para. 3-0.

63. Dep't of Army, Reg. 15-6, Investigation Guide for Informal Investigations (Jan. 1997).